IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MOTION FILED

MAY 12 1976

No. 75-946

CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, *et al.*,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
MADISON TEACHERS, INC.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

JAMES NEWTON WILHOIT, III
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

REX H. REED
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

JAMES K. RUHLY
Melli, Shiels, Walker & Pease, S.C.
309 Insurance Building
119 Monona Avenue
Madison, Wisconsin 53703

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON JOINT SCHOOL
DISTRICT NO. 8, *et al.*,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION
and
MADISON TEACHERS, INC.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, the National Right to Work Legal Defense Foundation hereby moves for leave to file the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed. Appellee, Madison Teachers, Inc., is the only party that has withheld its consent to the filing of this brief.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is an organization formed to protect the Right to Work, freedom of association, freedom of speech, and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding any employee whose human and civil rights have been abridged or are about to be abridged, through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with protection of the legal right of any individual to express his views or the views of others with respect to the issue of joining or paying dues to a labor organization against his will.

There are fundamental liberties which are inherent under the Constitution of the United States. These liberties cannot be subordinated to the activities of any labor organization. In representing the individual members of the bargaining unit, a labor organization cannot expect to be able to suppress basic rights guaranteed under the Constitution of the United States and granted to every citizen, regardless of his occupation. The fundamental Constitutional right of an individual freely to speak out on public issues must not depend in any way upon his or her vocation, or upon membership or non-membership in a labor union or any other private organization.

The Foundation does not doubt that the appellant will fully argue their interest. However, the Foundation submits that it is the only one in a position to argue in

its annexed brief *amicus curiae* the position of those individuals to whom the appellees would deny free speech and whose constitutional rights have been abridged under the decision of the Wisconsin Court below. The Foundation is thus in a position, as advocate of all employees who wish to exercise their constitutional rights under the facts presented in this case, to contribute its assistance to the Court to properly set forth the issues involved and the broad ramifications that any decision of this Court might have on all public employees.

Respectfully submitted,

JAMES NEWTON WILHOIT, III
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

REX H. REED
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

JAMES K. RUHLY
Melli, Shiels, Walker & Pease, S.C.
309 Insurance Building
119 Monona Avenue
Madison, Wisconsin 53703

TABLE OF CONTENTS

	Page
INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION	2
SUMMARY OF THE ARGUMENT	2
STATEMENT	3
ARGUMENT:	
I. THE RIGHT TO PETITION A PUBLIC BODY AT A PUBLIC MEETING IS CONSTITUTIONALLY PROTECTED	7
II. REGULATION OF EXPRESSION ON THE BASIS OF CONTENT IS NOT PERMISSIBLE UNDER THE FIRST AMENDMENT	12
III. FIRST AMENDMENT RIGHTS NOT RELINQUISHED BY TEACHERS	14
A. Teachers Have the Same First Amendment Rights as Private Citizens	14
B. First Amendment Rights Subject Only to Balancing Test	17
IV. MR. HOLMQUIST'S STATEMENT CANNOT BE CHARACTERIZED AS "NEGOTIATING"	19
V. CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950)	17
Board of School Directors of Milwaukee v. WERC, 42 Wis.2d 637, 168 N.W.2d 92 (1968)	18
Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941)	12

Page

City of Madison Joint School District No. 8 v. WERC, 69 Wis.2d 200, 231 N.W.2d 206 (1975) 15, 18

DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1937) 7

Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 71 S.Ct. 857 (1951) 17

Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209 (1964) 9, 21

Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954 (1939) 10

Hanover Township Federation of Teachers, Local 1954 (AFL-CIO) v. Hanover Community School Corporation, et al., 457 F.2d 456 (7th Cir. 1972) 8, 9

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 64 S.Ct. 830 (1944) 18

Montgomery v. White, 320 F. Supp. 303 (E.D. Tex. 1969) 16

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 20

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) 20

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 14, 15, 19

Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286 (1972) 13, 19

Pred, et al. v. Board of Public Instruction of Dade County, Florida, et al., 415 F.2d 851 (5th Cir. 1969) 16

Schneider v. New Jersey, 308 U.S. 147, 60 S.Ct. 146 (1939) 7

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945) 9, 10

Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940) 10, 11, 12

Page

United States v. Cruikshank, 92 U.S. 542 (1876) 7

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967) 18

Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215 (1952) 15, 16

West Virginia State Board of Educatior, et al. v. Barnette, et al., 319 U.S. 624, 63 S.Ct. 1178 (1943) 7, 8

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975) 14

Constitutional Provisions and Statutes:

First Amendment, United States Constitution 2, 3, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 20, 21

Fourteenth Amendment, United States Constitution ...2, 3, 7, 9, 13, 16, 21

Wisconsin Statutes (1971):

§ 111.70(1)(a) 3

§ 111.70(1)(b) 12

§ 111.70(3)(a) 6

§ 111.70(4) 6

Miscellaneous:

Webster's New International Dictionary (3d ed.) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON JOINT SCHOOL
DISTRICT NO. 8, *et al.*,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION
and
MADISON TEACHERS, INC.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE
SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE*

This brief *amicus* in support of the position of the appellant City of Madison, Wisconsin, and in support of the legal right of all of the individual employees in the United States, is filed by the National Right to Work Legal Defense Foundation with leave of this Court pursuant to Rule 42 of the Rules of this Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The interest of the National Right to Work Legal Defense Foundation in participating as *amicus curiae* in this case is set forth in the Motion for Leave to File *Amicus Curiae* Brief annexed hereto.

SUMMARY OF THE ARGUMENT

In this case, the basic issue before the Court is whether a state labor statute may require, consistent with the First and Fourteenth Amendments to the United States Constitution, a duly elected Board of Education to refuse to permit a teacher-employee citizen an opportunity to speak and present a petition to the Board on a matter subject to collective bargaining at a regular public meeting of such Board and during the portion of the meeting devoted to appearances by citizens.

At the very roots of our form of government is a basic guaranteed constitutional right to speak out on subjects of public interest and to petition for a redress of grievances. The expression by an individual of his views on public affairs is, and also has been, a matter considered by this Court to be within the most basic and precious rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The content of what an individual has to say has never been subjected to regulation except that government has been permitted to regulate speech by imposing time, place, and manner regulations on the

availability of forum. The state statutes prohibiting speech on the basis of subject matter have been stricken because of their failure to meet constitutional standards absent grave and immediate danger to the interest of the State.

In this instance, there is nothing in the record that would support a finding of "grave and immediate danger" in what Mr. Holmquist said to the Board of Education. This Court has imposed a balancing test on First Amendment rights, and the Wisconsin Court below failed to apply that standard. It would, without a doubt, permit Mr. Holmquist's statement. Thus, the decision of the Wisconsin Court must be reversed.

Furthermore, if the Holmquist statement can be categorized as "negotiating", then the Wisconsin statute in question is too broad to survive constitutional scrutiny. The limitation of the freedoms set forth under the First and Fourteenth Amendments as espoused by the Wisconsin Supreme Court cannot be upheld under the rationale expressed by this Court in the past. It would therefore stand to reason that this limitation cannot be permitted to stand.

For these reasons, the decision of the Wisconsin Supreme Court below should be reversed.

STATEMENT

Appellant, Joint School District No. 8, City of Madison, Villages of Maple Bluff and Sherwood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, (hereinafter referred to as the "District") is a City School District and is a City Employer as defined in Section 111.70(1)(a), Wis. Stats. (1971), with its

principal office located in Madison, Wisconsin; and appellant, Board of Education of Joint School District No. 8 (hereinafter referred to as "Board of Education"), is an agent of the District and is charged with the possession, care, control, and management of the property and the affairs of the District. Madison Teachers, Inc., appellee, is a labor organization and represents the collective bargaining unit of the teachers in the District. The Wisconsin Employment Relations Commission, a party in the case in the state courts, has formally waived its right to participate herein.

The Board of Education and Madison Teachers, Inc., engaged in negotiations regarding wages, hours, and conditions of employment for the teachers in the bargaining unit for the calendar year, 1972. These negotiations took place from January 25, 1971, until December 14, 1971, when an agreement was reached between the parties.

On December 6, 1971, the Board of Education held a public, regularly scheduled Board meeting. At the public appearance portion of that meeting, Albert M. Holmquist, who was a teacher employed by the Board of Education and who was not a member of Madison Teachers, Inc., presented the results of a survey that he and a fellow teacher had taken. Mr. Holmquist at the time was a resident of the City of Madison.

Mr. Holmquist had filled out a card that had been given to him at the beginning of the meeting. This card was one that was given to all those individuals in attendance who wished to make a public appearance in order to make a statement before the Board of Education. Mr. Holmquist did not indicate on the registration card his topic of conversation. Notification of the subject matter upon which one wished to speak

was not a pre-requisite to being permitted to speak at the public meeting.

Prior to this meeting, Mr. Holmquist and thirteen other teachers had prepared a petition which they circulated among the teachers in forty-nine of the fifty schools in the District. They had obtained the signatures of a large number of the teachers in the School District requesting that the "fair-share" concept that was being negotiated be studied by an impartial committee composed of representatives from all concerned groups, so that this proposal could be clearly defined and clarified. The petition requested that the findings of the impartial committee be made public.

At the December 6, 1971, meeting, Mr. Holmquist read this petition to the Board of Education. The only conversation between Mr. Holmquist and the Board of Education was a question asking Mr. Holmquist if he intended to communicate the results of the petition to the Board when he had completed obtaining teacher signatures. In response to this question from the School Board president, Mr. Holmquist answered in the affirmative.

Mr. Holmquist, although permitted to read his petition before the Board of Education, did not engage in any discussion or argument before the Board concerning the "fair-share" concept. Though he stated that he represented an informal committee of seventy-two teachers in the District, the petition which he read was signed by over four hundred District teachers.

In January, 1972, Madison Teachers, Inc., filed a complaint with the Wisconsin Employment Relations Commission alleging that the Board of Education committed a prohibited labor practice when it listened to a teacher-employee at its regular meeting of

December 6, 1971. The Board of Education denied this allegation and on February 28, 1972, a hearing on the complaint was conducted by the Wisconsin Employment Relations Commission.

On September 13, 1972, the Commission issued findings of fact, conclusion of law, and an order in the matter. The Commission determined that the petitioner violated its duty to bargain in good faith with Madison Teachers, Inc., and thus committed an unfair labor practice under Section 111.70(3)(a) and (4) of the Municipal Employment Relations Act when it listened to a teacher-employee at its regular meeting.

The Commission, pursuant to this determination, ordered the Board of Education to cease and desist permitting any teacher-employee, other than representatives of Madison Teachers, Inc., from appearing and speaking "on matters subject to collective bargaining between the petitioner and Madison Teachers, Inc." at meetings of the Board of Education.

The City of Madison petitioned the .Dane County Circuit Court for review and that Court entered a decision on October 2, 1973, affirming the Commission and dismissing the Petition for Review.

On June 30, 1975, a divided Wisconsin Supreme Court affirmed the decision of the Circuit Court. The City of Madison petitioned for rehearing and on September 30, the State Supreme Court refused to reconsider its earlier finding.

ARGUMENT

I.

THE RIGHT TO PETITION A PUBLIC BODY AT A PUBLIC MEETING IS CONSTITUTIONALLY PROTECTED.

Any state statute that would require a Board of Education to refuse to hear a citizen, whether he be a teacher or not, on any subject at a public meeting, is subject to constitutional scrutiny. This Court, in *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) said:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. (This case was cited with approval in *DeJonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260 (1937).)

The language of the First Amendment to the Constitution of the United States is explicit. It provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peacefully to assemble, and to petition the government for a redress of grievances." These fundamental First Amendment rights have been made applicable to the States through the "due process" clause of the Fourteenth Amendment. *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146 (1939) and *West Virginia State Board Education, et al. v. Barnette, et al.*, 319 U.S. 624, 63 S.Ct. 1178 (1943).

Freedom of speech and freedom to petition the government for a redress of grievances are rights which the writers of the Bill of Rights jealously preserved to

each citizen against any encroachment. The very purpose of the Bill of Rights was to remove certain subjects from the realm of political controversy, and to place them as legal principles to be applied to the courts. In *West Virginia State Board of Education, et al. v. Barnette, et al., supra,* this Court said in discussing prohibitions on freedom of speech:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. 319 U.S. at 641, 63 S.Ct. at 1186-87.

Mr. Justice John Paul Stevens, when he was a judge on the Court of Appeals for the Seventh Circuit, said in *Hanover Township Federation of Teachers, Local 1954 (AFL-CIO) v. Hanover Community School Corporation, et al.,* 457 F.2d 456 (7th Cir. 1972):

> The First Amendment protects the right to advocate, either individually or through an association, and also the association's right to engage in advocacy on behalf of its members. (citations omitted.) A State may not invade that constitutional protection, either by a general advance prohibition against certain forms of advocacy (citation omitted), or by attempting to punish the expression of views that it opposes. 457 F.2d at 459-60.

In *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S. Ct. 209,216 (1964), this Court said that "speech concerning public affairs is more than self-expression, it is the essence of self-government." Mr. Holmquist's appearance before and presentation to the Board of Education was the exercise of a right guaranteed by the First and Fourteenth Amendments. A law which would prohibit this exercise of that right under the circumstances here presented is a law which conflicts with the Constitution. There is no grave and immediate danger to any interest which would warrant such a prohibition on the freedom of an individual to speak to a public body. Concerning First Amendment rights, this Court said in *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 322-23 (1945):

> That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice . . .
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Madison Teachers, Inc. has contended that the "fair-share" proposal was in dispute and hence there was in effect a labor dispute. If this is true, then a statement made about this dispute would be protected by the constitutionally guaranteed right to disseminate one's views as long as they do not present a grave and immediate danger to interests which the State can lawfully protect. Citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954 (1939), this Court said in *Thomas v. Collins*, "[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." 323 U.S. at 522, 65 S.Ct. at 324.

Even if what Mr. Holmquist said before the Board of Education could be considered an argument or discussion on his part, as opposed to the presentation of a petition or grievance to a public body, the First Amendment would protect Mr. Holmquist's statements because the free trade of ideas and the opportunity to persuade to action and not merely to describe facts, is a protected right. *Thomas v. Collins, supra.*

In a discussion of First Amendment rights in *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940), this Court said:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economical

> truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. 316 U.S. at 95, 60 S.Ct. at 741.

This Court went on to say:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. 316 U.S. at 101-02, 60 S. Ct. at 744.

If the Board of Education had denied Mr. Holmquist the right to present his petition, he in effect, would have been thwarted in his effort to present to a public body a position on a significant issue of great controversy and public interest. While the subject of public employee collective bargaining is now receiving a great deal of attention not only from legislative bodies but from the public as well, so is the question of compulsory unionism agreements for these public employees. Abridgement of the right of one of these employees to discuss the matter of forced payment of union dues could be justified only where there was a clear danger of "substantive evils aris[ing] under circumstances affording no opportunity to test the

merits of ideas by competition for acceptance in the market of public opinion." 310 U.S. at 105, 60 S.Ct. at 745. There is, in this instance, no "substantive evil" or "clear and present danger" that could justify any restriction of the exercise of free speech by a teacher-citizen where the subject to be commented on was the payment of compulsory dues to a labor union. And to require the Board of Education to refuse to hear an individual who had something to say on that subject by finding a prohibited labor practice is in direct conflict with the intent and purpose of the Bill of Rights. As this Court said in *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194 (1941), the language of the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

II.

REGULATION OF EXPRESSION ON THE BASIS OF CONTENT IS NOT PERMISSIBLE UNDER THE FIRST AMENDMENT.

The order of the Wisconsin Employment Relations Commission which required the School Board to prohibit any teacher other than a union representative from appearing and speaking at Board meetings "on matters subject to collective bargaining" is unconstitutional. "Matters subject to collective bargaining" are defined by Wisconsin Statute as "wages, hours, and conditions of employment." Sec. 111.70(1)(b), Wis. Stats.

We submit that a prohibition on speaking about "matters subject to collective bargaining" constitutes regulation of speech on the basis of the content or subject matter of that speech. Such a prohibition cannot withstand the dictates of the First Amendment to the United States Constitution. This Court recently reiterated that, although government may regulate speech by imposing time, place, and manner regulations on the availability of forums, it may not, under the First and Fourteenth Amendments, regulate expression on the basis of the content or subject matter of that expression. This Court said, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972).

The state statute in question has the effect of prohibiting teachers from expressing opinions, unless the union majority agrees with these opinions, on any subject "subject to collective bargaining." Since "wages" clearly falls in that category, the amount of district funds available as wages is a subject upon which all citizens, except a dissenting teacher, may express an opinion. The teacher must agree with the majority of the teachers, or be prohibited from speaking to the Board, on how his taxes will be spent. The same is true with "hours," and the possibility of year-round class instruction is a subject upon which all citizens, except a dissenting teacher, could express an opinion. The teacher must agree with the majority of the teachers, or be prohibited from advocating to the Board an innovative educational idea.

We submit that a state labor statute which reaches this far in the interest of protecting exclusive negotiator status in the further interest of preventing a "chaos in labor management relations" reaches too far. There is no evidence whatsoever in the record that such chaos existed or would have existed; and protecting against some speculative entity does not require elimination of public debate. It does not require the silence of all but the majority's view, nor does it require subordination of individual constitutional rights to collective statutory rights.

III.

FIRST AMENDMENT RIGHTS NOT RELINQUISHED BY TEACHERS.

A. Teachers Have the Same First Amendment Rights as Private Citizens.

As a private citizen, Mr. Holmquist had a protected First Amendment right to make a position statement to the Board of Education during a meeting open to the public. As a concerned citizen, he was entitled to submit opinions and arguments during the public portion of the meeting, and permitting him to do so should not subject the Board to a finding of an unfair labor practice. In fact, denying him such right might have subjected the Board to a federal civil rights action. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992 (1975).

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), this Court said that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on

matters of public interest in connection with the operation of the public schools in which they work. . ." 391 U.S. at 568, 88 S.Ct. at 1734. Nowhere in the majority opinion of the Wisconsin Supreme Court below, 69 Wis.2d 200, 231 N.W.2d 206 (1975), is there any reference to this Court's opinion in the *Pickering* case. Had that Court squarely faced the decision of this Court in *Pickering*, it would have had to reach a different conclusion. There is no question that under the Wisconsin law, any private citizen, not a teacher, would have had the right not only to present a petition to the Board of Education but in fact discuss and argue the subject of a so-called "fair share" agreement; and, thus, the Wisconsin Municipal Employee Bargaining Law cannot act to deny a teacher-citizen's basic First Amendment right solely because the speaker is a member of the collective bargaining unit. The right of any teacher, or for that matter any other individual, to speak at a public meeting before a public body must be protected. To abridge this most basic and fundamental constitutional right because of artificial considerations is particularly pernicious when, as here, the forum and the speaker are so directly responsible for educating our children.

The State cannot interfere with the protection afforded by the Constitution, absent grave and immediate danger to interests which the State may lawfully protect. There is and was no grave and immediate danger presented by Mr. Holmquist's statement to the Board of Education. In *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952), in a concurring opinion in which Mr. Justice Douglas joined, Mr. Justice Frankfurter made some observations about the constitutionally guaranteed right of freedom of speech. He said:

> By limiting the power of the State to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. . . . 344 U.S. at 195, 73 S.Ct. at 221.

To relegate teachers to a position of a second class citizen because they are teachers would be unconscionable and in direct conflict with the Constitution. Any law which would stifle fundamental personal remedies cannot be allowed to go unchallenged. *Pred, et al. v. Board of Public Instruction of Dade County, Florida, et al.*, 415 F.2d 851 (5th Cir. 1969) and *Montgomery v. White*, 320 F. Supp. 303 (E.D. Tex. 1969). If the Board of Education had denied Mr. Holmquist the right to speak out at a public meeting because of his position as a teacher, it would have, in effect, punished him and caused him to suffer retaliation because, as a teacher, he was exercising a fundamental First Amendment right.

Mr. Holmquist's right of freedom of speech, as a teacher, is more important than any dubious good that might be obtained through the negotiation of a

so-called "fair share" agreement. In *American Communications Association v. Douds*, 339 U.S. 382, 399, 70 S.Ct. 674, 684 (1950) this Court held:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the court is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

Mr. Holmquist's freedom of speech must be placed in the position above and must be considered to weigh more than any harm that might have been done by the discussion of the so-called "fair share" agreement.

B. First Amendment Rights Subject Only to Balancing Test

The Wisconsin Supreme Court in the decision below said that the prohibitions against freedom of speech in this case were within the limits imposed upon the restriction of those rights by this Court in its decisions. The Wisconsin Court quoted the balancing test adopted from the rule imposed by Judge Learned Hand below and imposed by this Court in its opinion in *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 94, 510, 71 S.Ct. 857 (1951). The rule as set forth was "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbility, justified such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212.

Although the Wisconsin majority cited the *Dennis* test, it did not apply that standard. They did not face

the question of "improbability" of the "evil." The only "evil" that was discussed consisted of a speculative assertion of the possibility of "relative chaos." 69 Wis.2d at 211, 231 N.W.2d at 212. This analysis is simply constitutionally inadequate in the context of an admitted constitutional infringement. Given the test which the Wisconsin majority set forth in their opinion, there is a complete and total failure on their part to point out any "evil" that might have come about as a result of Mr. Holmquist's statement.

The question of labor strife, which would be a possible issue in the private sector, should not even be considered in the public sector. Strikes are not permissible under Wisconsin law, and therefore, industrial peace is not at issue. Furthermore, in both the case at bar and in *Board of School Directors of Milwaukee v. WERC*, 42 Wis.2d 637, 168 N.W.2d 92 (1968), the WERC did not find labor peace to be threatened by speech. Hence, it should follow, that there is no public interest that would justify any encroachment on the fundamental constitutional right of freedom of speech of Mr. Holmquist, or for that matter, any other teacher who appeared to make a statement before the Board of Education at a public meeting. The Wisconsin Supreme Court was not jusitifed in finding otherwise.

The reliance of the Wisconsin Court below on such cases as *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) and *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 64 S.Ct. 830 (1944) is clearly misplaced. See 69 Wis.2d at 212, 231 N.W.2d at 213. Constitutional questions were not at issue in either one of these decisions nor in the precedents upon which this Court based its decision in these two cases. Furthermore, this Court has never ruled on whether the free speech of an

employee in either the private or public sector may be limited constitutionally on the basis of some formula for restraining and muffling expression, under the pretext of protecting the exclusive representative. Thus, the attempt of the Wisconsin Supreme Court majority to rest its decision on rulings of this Court is completely unfounded.

To permit a union to limit the subjects upon which a teacher-citizen can speak simply by putting the matter on the bargaining table, is directly contrary to this Court's decisions in both *Pickering, supra*, and *Police Department of Chicago v. Mosley, supra*.

IV.

MR. HOLMQUIST'S STATEMENT CANNOT BE CATEGORIZED AS "NEGOTIATING"

Contrary to the opinion of the Wisconsin Supreme Court, the statements by Mr. Holmquist in question cannot even be considered "negotiating". "Negotiate" is defined in *Webster's New International Dictionary* (3d ed.) as: ". . . 1: to communicate or confer with another so as to arrive at the settlement of some matter: to meet with another so as to arrive through discussion at some matter: to meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms, esp. in state matters by meetings and discussions . . ." Mr. Holmquist merely presented a petition to the Board of Education and explained what the petition said. He did not negotiate as that word is defined, nor did he even discuss the pros or cons of the so-called "fair-share"

issue. The Wisconsin Supreme Court seemed to infer that what Mr. Holmquist said had a substantial influence on the course of negotiations; but, to accept that contention would impute to the School Board a lack of firmness, wisdom, or honor, which would be an unjustified conclusion. Nowhere in the record is there justification for the contention that the presentation of the petition influenced the decision of the School Board, or, for that matter, that the argument of anyone influenced the Board's decision to the point where the Board insisted on the exclusion of the so-called "fair share" clause in the contract.

But if Mr. Holmquist's statement can be equated to "negotiating" as that word is defined, and if his statement can thus be found to be in violation of the Wisconsin statute in question, then that statute is too broad to survive constitutional scrutiny. The prohibition against "negotiation" must fall just as "the various other formulae for the repression of expression that have been challenged in the Court" on other occasions. *New York Times Co. v. Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 720 (1964). "Negotiation" must be measured by the same First Amendment standards as set forth previously by this Court; and any prohibition by the Wisconsin statute in question is not in such a position as to warrant immunity from constitutional limitations recognized by this Court because "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina v. Alford,* 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970).

However, the public meeting of the Board of Education was not a negotiation session. Instead, it was a meeting where citizens of the jurisdiction could meet and give a position statement. The exclusivity of the

bargaining representative in employer-employee relations cannot be permitted to reach or include the silencing of all voices except that of the designated representative. Public forum type discussions are truly in the American tradition, and town meetings such as the meeting of the Board of Education in question, must be left open to everyone and must not exclude any group of persons, such as teachers. Freedom of speech is fundamental to a free society and "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 216 (1964). The First and Fourteenth Amendments incorporate a total national commitment to open, uninhibited debate of public issues. If the School Board were open to charges of unfair labor practices every time a citizen presented a petition or discussed a matter of public interest, then the basis and foundation of the constitutional rights guaranteed to all citizens under these Amendments would be betrayed.

V.

CONCLUSION

For the reasons stated herein, the decision and judgment of the Wisconsin Supreme Court should be reversed. Justice and sound policy dictate that result. There is no justification for the thwarting of the basic

and fundamental constitutional rights of freedom of speech and freedom to present a grievance to a public body.

Respectfully submitted,

JAMES NEWTON WILHOIT, III
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

REX H. REED
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

JAMES K. RUHLY
Melli, Shiels, Walker & Pease, S.C.
309 Insurance Building
119 Monona Avenue
Madison, Wisconsin 53703